IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, Appellant,
v.
STEPHEN C. MILLS. } No. 509.

BRIEF FOR APPELLEE.

I. Statement of the Case.

The claimant, Stephen C. Mills, was during the time covered by this claim Inspector-General in the army and on duty in the Philippine Islands from May 26, 1900, to April 15, 1902. From May 26, 1900, to February 2, 1901, he was of the rank of major and after that date of the rank of lieutenant-colonel.

His pay in these respective grades was as prescribed by the following provisions of the Revised Statutes:

"Section 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations; * * *

"Lieutenant-colonel: $3,000 a year; Major: $2,500 a year. * * *

"Section 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

[Amended by Act of June 30, 1882 (22 Stat. L. 118), to provide that the increase "shall be computed on the yearly pay of the grade."]

"Section 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

"Section 1267. In no case shall the pay of a colonel exceed $4,500 a year, or the pay of a lieutenant-colonel exceed $4,000 a year."

The claimant received pay under these statutes as follows:

As Major:	
Grade pay under R. S. § 1261	$2,500 00
Longevity pay under R. S. §§ 1262, 1263 . .	1,000 00
Total pay	$3,500 00
As Lieutenant-Colonel:	
Grade pay under R. S. § 1261	$3,000 00
Longevity pay under R. S. §§ 1262, 1267 . .	1,000 00
Total pay	$4,000 00

While he was serving in the Philippine Islands Congress passed the two following acts:

"That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace." May 26, 1900, 31 Stat. L. 211.

"That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto." March 2, 1901, 31 Stat. L. 903.

In paying the increase of "pay proper" provided by these acts, the amount was calculated only upon the minimum or grade pay fixed by § 1261. His claim is that the increase provided by these acts should be based upon the entire pay received, including the longevity increases.

The annual rate of pay received and claimed while on this duty may be tabulated as follows:

As MAJOR:

Received—

Grade pay, under R. S. § 1261	$2,500 00
Longevity pay under R. S. §§ 1262, 1263 . .	1,000 00
Foreign service increase under acts of 1900 and 1901, ten per cent on grade pay alone . . .	250 00
Total received while on foreign service .	$3,750 00

Claimed—

Foreign service increase under acts of 1900 and 1901, ten per cent on longevity pay also . .	100 00
Total claimed to be due	$3,850 00

As LIEUTENANT-COLONEL:

Received—

Grade pay under R. S. § 1261	$3,000 00
Longevity pay under R. S. §§ 1262, 1267 . .	1,000 00
Foreign service increase under acts of 1900 and 1901, ten per cent on grade pay alone . . .	300 00
Total received while on foreign service .	$4,300 00

Claimed—

Foreign service increase under acts of 1900 and 1901, ten per cent on longevity pay also . .	100 00
Total claimed to be due	$4,400 00

The Court of Claims sustained this view and rendered judgment for the amount claimed, aggregating $188.87. This judgment was based upon its prior opinion in the case of *Irwin* v. *United States* (38 C. Cls. 87). The material part of that opinion is embodied in the record of this case (pp. 4, 5).

The appeal of the United States questions the correctness of this conclusion.

II. Brief of Argument.

This case turns upon the meaning of the words "pay proper" as used in the acts of May 26, 1900, and March 2, 1901, granting an increase of "pay proper" to officers serving in the Philippine Islands and elsewhere beyond the limits of the United States.

The Government contends that "pay proper" means one kind of pay, the pay of the grade fixed by R. S. § 1261. The claimant contends that "pay proper" means pay, as distinguished from allowances; that it includes both grade pay and longevity pay and that the term is equivalent to "what is properly pay," or "pay itself," or "pay alone." The term is technical. Its meaning can be found by reference to legislative, judicial, and executive authority as well as to the received meaning of the adjective "proper" when following its noun.

This question was elaborately considered by the Court of Claims in the case of *Irwin* v. *United States* (38 C. Cls. 87). As the material portion of its opinion in that case is reproduced in the record (pp. 4, 5), giving the ground of its decision in this case, it is not necessary to quote it here. A few suggestions may be added to reinforce the conclusion reached by the Court of Claims.

Dictionary Definitions.

The use of the term "pay proper" as meaning "whatever is in a proper sense pay" is in strict accord with the definitions of the word "proper" found in the dictionaries, as follows:

Webster's Dictionary:

"*Proper:* 6. Rightly so called; strictly considered; as Greece proper; the garden proper."

Century Dictionary:

"*Proper*—5. Rightly so called, named or described; taken in a strict sense, usually following the noun, as the apes proper belong to the Old World. No shell fish are fishes proper.

"'This elevation descended into what might be called the garden proper.' Scott, Waverly, IX.

"'It is safe to assert that no government proper ever had a provision in its organic law for its own termination.' Lincoln in Raymond, p. 614."

Standard Dictionary:

"*Proper*—4. Conceived according to the strict definition or application of the term; understood in the most approved or correct sense; commonly following the noun modified.

"'A mere physical affection of the organism does not constitute a sensation proper.' Spencer, Psychology, vol. ii, § 353, p. 246."

These definitions are exactly applicable here. The term "pay proper" means that part of an officer's compensation which is properly called pay as distinguished from allowances.

Judicial Precedents.

There is no direct definition of "pay proper" to be found either in statute or in judicial decision. We shall show hereafter how the term when used in a statute was practically construed.

The decision of this court in *United States* v. *Tyler*, 105 U. S. 246, involves a practical definition of the term in its application to this case.

Revised Statutes, § 1261, provides that officers of the army shall be entitled "to the pay hereinafter stated." Then follows a certain rate of pay for each grade.

Section 1262 provides that they shall have a longevity increase of "ten per centum of their current yearly pay for each term of five years."

Section 1263 provides that the total increase shall not exceed forty per centum on the "yearly pay of the grade" as provided by law.

In these two sections there are two designations for officers' pay, "current yearly pay" and "yearly pay of the grade." The minimum pay fixed by section 1261 is called "the yearly pay of the grade."

The question in the *Tyler* case was whether "current yearly pay" was equivalent to "yearly pay of the grade," or whether it meant the "yearly pay of the grade" plus the increase under section 1262. This court held that "current yearly pay" in section 1262 meant the entire yearly pay of an officer, including both grade and longevity pay. In concluding its opinion the court said (105 U. S. 246):

"We also hold that the words 'current yearly pay,' in § 1262, require that, when the inceased pay for any period of five years is to commence, the ten per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of ten per cent previously earned for periods of five years, constitute the current yearly pay on which said ten per cent is to be calculated."

That decision is decisive of the present case, because it holds that longevity pay is a part of the officer's pay

and thus distinguishes it from allowances. If it is pay and not allowances, it is "pay proper."

In *Emory* v. *United States*, 19 C. Cls. 254 (affirmed 112 U. S. 510), the Court of Claims shows in a number of passages the use of the term "pay proper" as equivalent to "pay" distinguished from allowances. Thus (p. 266):

"A number of questions here arise as to what shall be deemed the 'extra pay provided for by the Act of July 19, 1848.' Does 'pay' mean simply that part of military compensation generally termed 'pay,' and sometimes 'pay proper,' or does it mean the entire compensation known as 'pay and allowances'?"

Again (p. 267):

"As to the question whether the term 'pay' when applied to army officers means pay and allowances or pay proper."

The court refers to the change in the system of pay and allowances in these terms (p. 268):

"At the present time these allowances to army officers for the most part have been abolished, and the pay proper correspondingly increased."

As an illustration of the certain and fixed meaning of the words "pay proper," we refer to the characterization in that opinion (p. 269) of these words, as "the unmistakable term 'pay proper.'"

The court says again as to the uses of the words "pay" and "pay proper" (p. 269):

"In the third place, the word 'pay,' in the act of 1848, for more than thirty-five years has been held to mean pay proper, and nothing more."

That carefully considered opinion conclusively shows the actual use of the words "pay" and "pay proper," as

equivalent. The word "proper" does not refer to any special kind of pay, but means that compensation which is properly called "pay."

Executive and Legislative Precedents.

The Court of Claims refers in the course of its opinion to a decision of the accounting officers (4 Comp. Dec. 668) adverse to this definition of pay proper. The departmental and legislative precedents cited in that decision are all in favor of the definition upheld by the Court of Claims. We quote therefrom as follows (4 Comp. Dec. 670, 671):

"The term 'pay proper' seems to have been employed in the earlier decisions and opinions as a means of distinguishing with greater accuracy between 'pay' and 'allowances.' On August 15, 1852, Second Comptroller Phelps, in passing upon a claim for emoluments or allowances under a private act granting thirty-five years' half-pay, used the following language:

"'The term "half-pay" is one that is very commonly used in our statutes, and has long ago acquired in commerce, as well as at the Departments and in the courts, a distinct and well-understood legal significance. It has always been construed to mean half the *pay proper* of the officer, exclusive of his emoluments and allowances, which are entirely distinct from the pay, are greater in amount, authorized by different enactments, and payable out of other appropriations.

"'A familiar instance of this construction will be found in the numerous military and naval half-pay pensions which have always been understood as authorizing half-pay proper.'

"In computing the three months' extra pay given by the act of July 19, 1848 (9 Stat. 248), for service in the war with Mexico, it was the rule to include only what the soldier was entitled to receive by way of stated compensation, as distinguished from allowances or emoluments; and, in order to more clearly define the distinction, the

words 'pay proper' were used in the decisions construing said act.

"The words 'pay proper' were apparently first used in legislation in section 4 of the act of March 3, 1865 (13 Stat. 497), which granted an addition of three months *pay proper* to certain officers of the volunteer army who should serve to the end of the war, to be paid on their discharge. The words were also used in section 1, act of March 2, 1867 (14 Stat. 422), granting an increase of 33⅓ per cent of the *pay proper* of certain officers of the army for two years after July 1, 1866. In computing the three months' pay proper under the act of March 3, 1865, where an officer was discharged after July 1, 1866, and was therefore entitled to the one-third increase provided for in said act of March 2, 1867, such increase was included, thus treating it as a part of 'pay proper.' (Dec. Second Comptroller, Vol. 45, p. 129.) These cases are the only ones I have been able to find where the words 'pay proper' have been construed as including or excluding increased pay."

Thus it appears that in the only actual instance that has occurred in the past to raise this question an analogous increase of pay was treated as part of the pay proper and the amount thereof included as part of a grant of "pay proper."

Longevity increase is nowhere treated by military authorities as an emolument or allowance, but always as a part of the pay. (Scott's Military Dictionary, words "Pay" and "Allowances"; 10 Opinions of Attorneys-General, 284; Digest of Opinions of Judge Advocates-General of the Army, Revised Edition, 1901, Paragraphs 1894, 1969.) Not being an allowance, it is a part of the pay itself, or of the "pay proper."

Summary.

This examination shows:

(1) That the adjective "proper" following its noun is intensive and not discriminative;

(2) That the Departments have always held "pay" and "allowances" to be different forms of compensation;

(3) That the term "pay proper" in a past act was construed to include a temporary increase of pay;

(4) That this court has held that the longevity increase is not an allowance but a part of the "current yearly pay."

The inference can not be resisted that an increase of "pay proper" is an increase of the entire pay, excluding only any increase of the allowances.

Congressional Disapproval of Definition.

A decision of the Comptroller is cited in the brief for the United States to show that the expression "pay proper" includes only the minimum or grade pay and excludes all longevity increases. The principal argument made in that decision is that Congress in the Army Appropriation Act of March 15, 1898, appropriated separately "for pay proper of enlisted men" and for "additional pay for length of service" (30 Stat. L. 318), thus contrasting, it is said, "pay proper" and longevity pay.

This decision related entirely to enlisted men, the acts now under construction not having been passed when it was rendered, June 2, 1898 (4 Comptroller's Decisions, 668). At the very next session of Congress the form of appropriation was changed. In the appropriation act of March 3, 1899, it assumes this form (30 Stat. L. 1065):

"Pay of enlisted men of all grades, including recruits, thirteen million five hundred thousand dollars.

"For additional pay for length of service, seven hundred and twenty-five thousand dollars."

The same form of appropriation continues in the army appropriation acts of May 26, 1900 (31 Stat. L. 206); March 2, 1901 (31 Stat. L. 896); June 30, 1902 (32 Stat. L. 508; March 2, 1903 (32 Stat. L. 929), and April 23, 1904

(33 Stat. L. 260). Thus Congress seems to have recognized the impropriety of appearing to contrast "pay proper" and "additional pay for length of service." That form of expression was abandoned as soon as attention was called to it and a year before the act of 1900, the first of those to be construed here, was passed.

No such contrast was ever made in the appropriations for pay of officers. The form for such appropriation was as follows, even as far back as the act considered by the Comptroller, that of 1898 (30 Stat. L. 318):

"For pay of officers of the line, two million eight hundred and sixty-five thousand dollars.

"For pay of officers for length of service, to be paid with their current monthly pay, seven hundred and ninety thousand dollars."

See the same form in the acts of March 16, 1896 (29 Stat. L. 60), and March 2, 1897 (29 Stat. L. 609).

This form has ever since continued, as shown by the appropriation acts referred to.

Thus Congress has never used any form of legislation which can be argued to contrast "pay proper" and "longevity pay" of officers. It abandoned the form said to involve such a contrast in relation to enlisted men, as soon as an executive decision was based upon it. This was a year before the first act material to this case, that of 1900, was passed.

Conclusion.

The Court of Claims properly held that the ten per cent increase on the "pay proper" of the claimant as an officer of the army should be calculated upon his entire pay, including the longevity increases. Its judgment should be affirmed.

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